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No. 84-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH A. MURR,
Petitioner,

vs.

TENNESSEE BOARD OF LAW EXAMINERS AND
ATTORNEY GENERAL OF THE STATE OF TENNESSEE,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Tennessee

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the requirement of Tennessee Supreme Court Rule 7, Art. VIII § 8.01 that a bar applicant's commitment to serve the administration of justice in Tennessee be evidenced by proof that the applicant has established his domicile in Tennessee violates the Privileges and Immunities Clause of Art. IV § 2 of the United States Constitution.

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RULES WHICH THE CASE INVOLVES

In addition to the constitutional provision cited by the petitioner, this case involves the following rules of the Supreme Court of Tennessee:

Tennessee Supreme Court Rule 7, Art. I § 1.03:

> The Certificate of the Board will be based upon a determination that the applicant . . . (v) has evidenced a commitment to serve the administration of justice in this State.

(See appendix).

Tennessee Supreme Court Rule 7, Art. VIII § 8.01:

> The requisite commitment to serve the administration of justice in Tennessee subject to the duties and standards imposed on attorneys in this State shall be evidenced by:
>
> (a) A statement by the applicant before examination or before admission without examination that he or she intends to engage in the practice of law in Tennessee, and agrees to abide by the duties and standards imposed from time to time on attorneys in this State; and
>
> (b) Proof satisfactory to the Board that the applicant, before admission, has established his or her domicile in Tennessee.

(See appendix).

STATEMENT OF THE CASE

The petitioner's statement of the case is adequate except that it omits reference to the Board of Law Examiners' "Show Cause Order" of June 15, 1984 (see appendix), which states the Board's position on the petitioner's application. Also, the respondents do not adopt the argumentative portions of the petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

Tennessee does not have a pure residency requirement for admission to the bar. Residency has been used only as evidence of a commitment to serve the administration of justice in Tennessee, subject to the duties and standards imposed on attorneys in Tennessee. This case should be remanded to the Supreme Court of Tennessee to permit a determination whether the petitioner intends to engage in the practice of law in Tennessee and agrees to abide by the duties and standards imposed from time to time on attorneys in Tennessee, in light of *Supreme Court of New Hampshire v. Piper,* 53 U.S.L.W. 4238 (March 4, 1985).

ARGUMENT

This Case Should Be Remanded To The Supreme Court Of Tennessee For Reconsideration In Light Of *Supreme Court Of New Hampshire v. Piper,* 53 U.S.L.W. 4238 (March 4, 1985).

Subsequent to the filing of the petition for writ of certiorari in the instant case, this Court decided *Supreme Court of New Hampshire v. Piper,* 53 U.S.L.W. 4238 (March 4, 1985), in which this Court struck down New Hampshire's residency requirement for admission to the bar under the Privileges and Immunities Clause of Art. IV § 2 of the United States Constitution. Since the instant case presents a very similar issue, the respondents submit that it should be remanded to the Supreme Court of Tennessee for reconsideration in light of *Piper.*

It appears that *Piper* has abolished state residency requirements for admission to the bar. Tennessee does not, however, have a pure residency requirement; rather, residency is only to be considered as evidence of the applicant's commitment to serve the administrtion of justice in Tennessee subject to the duties and standards imposed on attorneys in this state. Tennessee Supreme Court Rule 7, Art. VIII § 8.01. Under *Piper,* Tennessee presumably cannot any longer use residency as evidence of such commitment on the part of the applicant.

The respondents submit, however, that this is not the end of the inquiry. The above-cited § 8.01 also requires the following as evidence of the applicant's commitment to serve the administration of justice in Tennessee:

> A statement by the applicant before examination or before admission without examination that he or she intends to engage in the practice of law in Tennessee, and agrees to abide by the duties and standards imposed from time to time on attorneys in this State.

The respondents therefore submit that a remand is appropriate to enable the Supreme Court of Tennessee, through its Board of Law Examiners, to determine whether the petitioner intends to engage in the practice of law in Tennessee and agrees to abide by the duties and standards imposed from time to time on attorneys in Tennessee. Since the petitioner is presently associated with a law firm in Colorado, the respondents submit that there remains a critical question of fact whether he truly intends to engage in the practice of law in Tennessee. The respondents submit that *Piper* does not require a state to admit a non-resident to the bar if he has no present intention of practicing law in that state. The states still presumably have the right to define the practice of law, and the Tennessee Board of Law Examiners has issued a "Statement of Policy" in that regard on September 25, 1984 (see appendix). The Tennessee Supreme Court has approved same by order of December 19, 1984 (see appendix). The respondents submit that the potential legal activities mentioned by the petitioner in his "Statement of the Case," at p. 5, would not necessarily suffice to evidence an intent to engage in the practice of law in Tennessee, *i.e.*, drafting wills, the preparation of a prenuptial agreement, the investigation into a potential cause of action for slander of credit, the rendering of tax advice, and the occasional representation of corporate clients doing business in Tennessee. The petitioner could accomplish the latter by means of the *pro hac vice* rule, Tennessee Supreme Court Rule 19 (see appendix).

CONCLUSION

For the foregoing reasons, the respondents submit that this Court should remand this case to the Supreme Court of Tennessee for reconsideration in light of *Supreme Court of New Hampshire v. Piper,* 53 U.S.L.W. 4238 (March 4, 1985).

Respectfully submitted,

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APPENDIX

APPENDIX A

LICENSING OF ATTORNEYS

Rule 7

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13.07 Informal Disposition.
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ARTICLE XIV. REVIEW OF BOARD DECISIONS

14.01 Petition for Review.
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ARTICLE I. ADMISSION TO THE BAR OF TENNESSEE

1.01 License Required

No person shall engage in the "practice of law" or the "law business" in Tennessee, except pursuant to the authority of this Court, as evidenced by a license issued in accordance with this Rule, or in accordance with the provisions of this Rule governing special or limited practice.

1.02 Certificate of Board

A license evidencing admission to the bar of Tennessee shall be granted by this Court only upon the Certificate of the State Board of Law Examiners (here called the "Board").

1.03 Criteria for Admission

The Certificate of the Board will be based upon a determination that the applicant: (i) is of the statutory age; (ii) has satisfied the educational requirements for admission specified by this Rule; (iii) has passed the examination required by this Rule, or is eligible for admission without examination; (iv) has demonstrated such reputation and character as in the opinion of

the Board indicates no reasonable basis for substantial doubts that the applicant will adhere to the standards of conduct required of attorneys in this State; and (v) has evidenced a commitment to serve the administration of justice in this State.

1.04 Waiver of Examination

In the case of an applicant who has been admitted to practice in another jurisdiction in this country, who satisfies the other requirements for admission, and who demonstrates competence to practice in Tennessee by meeting the criteria specified in this Rule, the Board may waive the requirement of passing an examination as hereinafter provided. (Article V).

1.05 Status of Persons Admitted

All persons admitted to the bar of Tennessee are by virtue of such admission: (i) officers of the courts of Tennessee, eligible for admission to practice in any court in this State, and entitled to engage in the "law . . . .

ARTICLE VII. FOREIGN APPLICANTS

7.01 Eligibility to Take Examination

Any applicant who received his legal education in a foreign country shall satisfy the Board that his undergraduate and law school education was substantially equivalent to the requirements of this Rule; and, in addition to complying with other pertinent provisions of this Rule, shall be required to take and pass the bar examination.

7.02 Additional Information on Licensed Foreign Applicants

Any applicant licensed to practice in a foreign country desiring admission in Tennessee shall be required to take the examination and shall supplement his application with the following documents: (i) a certified copy of the record or license of the court or agency which admitted him to practice law in such country, and (ii) at least 3 letters from attorneys or judges in

such foreign country certifying that he is in good standing at that bar, or was in good standing at that bar when he or she left that foreign country.

ARTICLE VIII. COMMITMENT TO SERVE THE ADMINISTRATION OF JUSTICE IN TENNESSEE

8.01 Applicable Standard

The requisite commitment to serve the administration of justice in Tennessee subject to the duties and standards imposed on attorneys in this State shall be evidenced by:

(a) A statement by the applicant before examination or before admission without examination that he or she intends to engage in the practice of law in Tennessee, and agrees to abide by the duties and standards imposed from time to time on attorneys in this state; and

(b) Proof satisfactory to the Board that the applicant, before admission, has established his or her domicile in Tennessee.

8.02 Waiver of Statement of Intent

(a) The Board in its discretion may waive the requirement of a statement of intent before exaimination for (i) any applicant who obtained his legal education from a law school located in the State of Tennessee, and (ii) any resident of Tennessee who graduated from a law school located outside the State of Tennessee.

(b) No license shall be issued to any applicant specified in this Section unless, after passing the examination, he (i) enters any branch of the military service; (ii) enters any branch of government service with the United States and presents evidence that his employment requires legal training; or (iii) furnishes the required statement of intent.

8.03 Interpretation of Residence and Domicile Requirements

In interpreting the residence and domicile requirements here imposed, the Board may excuse temporary absences which are not inconsistent with the basic purpose of the requirement to demonstrate a physical presence in Tennessee. A person may, in the discretion of the Board, be considered as having qualified under these domicile and residence requirements if such domicile and residence are established in an area closely contiguous to the boundaries of the State of Tennessee and in an area which is customarily regarded as a residential adjunct or suburb to the State of Tennessee.

ARTICLE IX. ISSUANCE OF LICENSE—EFFECTIVE DATE OF ADMISSION

9.01 Certificate of Board

Upon the completion of all requirements for admission, including the payment of all required fees, the Board, acting through the Administrator, shall certify to the Court that an applicant is eligible for admission.

9.02 Issuance of License

On the basis of the certificate of the Board, the Court shall issue a license admitting each successful applicant to the bar of Tennessee. The license shall be in such form as may be approved by the Court. Each such license shall be signed by the members of the Board and the members of the Court.

9.03 Effective Date of Admission

An applicant shall be considered as conditionally admitted on the completion of all the requirements for admission. The Board shall furnish such an applicant with a "Temporary Certificate of Eligibility to Practice Law," conditioned on final approval by the Court.

9.04 Duty of Applicant to Inform Board of Subsequent Events

If at any time prior to the issuance of a license to an applicant he or she becomes aware of any fact or circumstance which might indicate that such applicant is not entitled to admission, such applicant shall promptly advise the Board of such fact or circumstances.

9.05 Disapproval by the Court

At any time prior to the actual issuance of a license by the Court, the Court may for good cause disapprove the issuance of such license. On such disapproval, the Court shall enter an order stating the grounds for such disapproval and may refer the matter to the Board for such further action as the Court may deem appropriate.

APPENDIX B

BEFORE THE TENNESSEE BOARD OF LAW EXAMINERS

IN RE: JOSEPH A. MURR - REQUEST FOR ISSUANCE OF LICENSE

DOCKET NO. 84-19

SHOW CAUSE ORDER

Joseph A. Murr is a graduate of Memphis State University School of Law. He passed the Tennessee Bar Examination given in February, 1984. On May 3, 1984, he filed the requisite "Request for Issuance of License," a copy of which is attached.

The Board has determined that Mr. Murr meets the criteria for admission specified in Section 1.03 of Rule 7, except for a determination that he has "evidenced a commitment to serve the administration of justice in this state."

The requisite commitment to serve the administration of justice in Tennessee is required to be evidenced by a statement of intent to engage in the practice of law in Tennessee and to agree to abide by the duties and standards imposed from time to time on attorneys in this State; and proof that the applicant has established his or her domicile in Tennessee.

The Board may waive the requisite statement of intent *before examination* for applicants such as Mr. Murr who obtained their education from a Tennessee law school. Section 8.02(a). The power of the Board to waive the statement of intent with respect to issuance of a license is limited, however, to military or governmental service. Section 8.02(b). Similar provisions appeared in Section 20 of the prior Rule.

The Board has no power to waive the requirement of domicile.

On April 2, 1984, Mr. Murr advised the Board that his "new address" was in Denver, Colorado and that he intended to prac-

tice law in both Colorado and Tennessee (copy attached). The Administrator requested Mr. Murr to elaborate on his intentions. Mr. Murr replied by letter dated May 29, 1984 (copy attached). From that letter it appears that Mr. Murr has accepted employment with a Denver law firm and that he now resides in Denver. He states that his firm represents clients which are sometimes sued in Tennessee courts; that the plans to draft wills, prepare a prenuptial agreement, consider a potential cause of action for slander of credit and give tax advice to persons in Tennessee; and to develop a practice in "computer law."

The Board finds from the information furnished it that grounds for doubt exist as to whether Mr. Murr meets the criteria of a commitment to serve the administration of justice in Tennessee in that it does not appear that Mr. Murr is domiciled in Tennessee or that he intends to engage in the practice of law in Tennessee within the meaning of Article VIII of Rule 7.

Therefore, pursuant to Section 13.01 of Rule 7, Mr. Murr is directed to show cause why his request for issuance of a license should not be denied. His reply to this Order is due to be filed on or before July 2, 1984. Any such reply shall be in writing, under oath, and may include such affidavits or other documents as he may choose to furnish, including any discussion of applicable law. If the Board determines that any such reply is not sufficient, the Board shall notify the applicant and afford him an opportunity to be heard. The applicant has the right to petition the Tennessee Supreme Court for a review of any final decision of the Board.

Valerius Sanford, President

Wheeler A. Rosenblam,
Vice President

Charles W. Burson,
Secretary-Treasurer

Attest:

/s/ Katherine Darden
Administrator

Dated: June 15, 1984

APPENDIX C

BOARD OF LAW EXAMINERS OF TENNESSEE

STATEMENT OF POLICY RE "PRACTICE OF LAW"

In construing and applying the term "practice of law" as it is used in Rule 7 of the Rules of the Tennessee Supreme Court, the Board of Law Examiners has adopted the following policies:

1. "Practice of Law," as used in §§8.01 and 5.02 of Rule 7, will include both "practice of law" and "law business" as used in §1.01. The term "practice of law" as used in this statement will generally have the same meaning in all contexts of the construction and application of Rule 7.

2. The employment of an applicant by a corporation as an officer or employee, or employment as an employee of a governmental agency, is not in and of itself inconsistent with the admission of that applicant to the Bar of Tennessee.

3. The determination of whether a legally trained person is required to be licensed as being engaged in the practice of law or the law business under §1.01 of Rule 7, and entitled to be licensed as intending to engage in the practice of law under §8.01(a) of Rule 7 should be made initially by that person, and will be made by the Board, on the basis of the following criteria:

(a) The primary criterion is the applicant's commitment to serve the administration of justice in Tennessee. That commitment necessarily implies a relation to the Courts of Tennessee as an officer thereof; to the Bar of Tennessee as a member thereof; and to the public in Tennessee as a source of competent, independent, professional judgment.

Such commitment is necessarily largely a subjective concept. Thus, each applicant has the responsibility of becoming familiar with the duties and standards imposed on lawyers in Tennessee as expressed in Rules 8 and 9 of the Rules of the Tennessee Supreme Court and of evaluating his or her good faith in making that commitment in the light thereof.

(b) Whether an applicant intends to engage in the practice of law should be evaluated on the basis of whether that applicant intends to function as a lawyer. As Ethical Consideration 3-5 of Rule 8 points out, a single specific definition of what constitutes the practice of law is neither necessary nor desirable. Functionally, however, the key factor is the rendition of services that call for the professional judgment of a lawyer. The definitions expressed in §23.-3-101(a) and (b), Tenn. Code Ann., and in §20.2(e) of Rule 9 furnish further guidelines for such a functional test.

In addition, the Board will consider such other criteria as: whether the applicant is required by his or her employer to be licensed; whether and to what extent denying a license would be prejudicial to the interests of the applicant and his or her employer; whether the work of the applicant would be such as to make it appropriate to impose the duties and standards of Rule 8 and the disciplinary procedures of Rule 9 on the applicant; and any other factors which may appear to the Board to be relevant to the basic inquiry in the context of the particular application.

For the purpose of evaluating the statement of intent to practice law, a broad concept of the lawyers' function should be used. It should be recognized, however, that many of the specific tasks performed by lawyers may be, and often are, performed by non-lawyers. Accordingly, "practice of law" for purposes of admission is necessarily broader than "practice of law" for purposes of unauthorized practice. Nevertheless, where the primary function of an applicant will be in some capacity not requiring legal education or judgment, the required statement of intent cannot be given.

(c) In order to engage in the practice of law, a person must exercise and preserve his professional independence. Judgment is not truly professional unless it is independent. Whatever the nature of his relation to his client, the lawyer's professional

judgment must be his own. As Ethical Consideration 5-24 of Rule 8 provides:

> "Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in the loss of the professional independence of the lawyer."

4. In construing and applying the criteria for evaluating the experience of applicants for admission without examination under Article V of Rule 7, experience gained while working as an employee or officer of a corporation or as an employee of a governmental agency will not be excluded on the basis that such employment could not constitute the practice of law, and will be considered regardless of the jurisdiction in which that experience was gained.

5. Admission is granted in order that the applicant may serve the administration of justice in Tennessee. Such service requires that the applicant intend to engage in the practice of law in Tennessee. Competence and character should be tested as close to the actual beginning of practice as practicable. Therefore, the intention to practice must be a present intent.

6. Applicants who have been working in Tennessee as employees or officers of corporations, or as employees of governmental agencies, without being licensed, may be denied admission on the ground that they have been practising law in Tennessee without a license, if it appears that such applicants have been engaged in the practice of law under the criteria heretofore described and have knowingly and willfully disregarded the licensing requirement.

7. The result of the adoption of the statement of policy here enunciated will be that lawyers working as such in an institutional setting, whether as employees of a private corporation or

a state governmental agency, will generally and ordinarily not only be entitled to be licensed, but will also be required to be licensed. However, the adoption of this policy will not mean that all legally trained persons working for corporations or governmental agencies will be required to be licensed in Tennessee. Decisions as to whether a person is engaged in the unauthorized practice will have to be made on a case-by-case basis in the particular context in which the issue may arise.

BEFORE THE BOARD OF LAW EXAMINERS
OF TENNESSEE

IN RE STATEMENT OF POLICY CONCERNING THE MEANING OF "PRACTICE OF LAW" AS USED IN RULE 7 OF THE RULES OF THE TENNESSEE SUPREME COURT.

OPINION

The Board of Law Examiners has adopted a statement of policy concerning the meaning of the term "practice of law" as used in Rule 7 of the Rules of the Tennessee Supreme Court. A copy of that statement is attached as an appendix to this opinion.

This opinion is an explanation of the Board's rationale in adopting that statement of policy.

The statement of policy arises out of certain show cause orders issued by the Board to applicants for admission without examination. Those applications raised common issues with respect to the meaning of "practice of law" as that term is used in Rule 7 of the Rules of the Tennessee Supreme Court.

Responses to those show cause orders were filed by the applicants; amicus briefs were filed and other statements, arguments and briefs were received from numerous persons by the Board. All of those matters have been considered by the Board and are included in the record on which the statement of policy and this opinion are based.

On August 16, 1984, the Board conducted a joint hearing of such applications in order to expedite the thorough consideration of the issues and to facilitate consistent results. Post-hearing briefs have been filed. Contemporaneously with the issuance of the statement of policy and this opinion, the Board is issuing specific orders with respect to each of the applications in which such show cause orders were issued. Thus, this opinion is

not directed toward such specific applications, but, rather, is directed toward the general policies to be followed by the Board.

STATEMENT OF ISSUES

The issues in these proceedings arise as a result of the changes in the nature of the legal profession in recent years. Those changes may fairly be characterized as evidencing the increasing commercialization, institutionalization, specialization and nationalization of the profession. Of necessity, the nature and extent of those changes have brought new and difficult questions of policy with respect to the admissions process administered by this Board.

Rule 7 of the Rules of the Tennessee Supreme Court governs admission to the bar of Tennessee. The present form of that Rule became effective on March 1, 1984. Under § 1.03 of that Rule, there are five criteria for admission:

> "[T]he applicant: (i) is of the statutory age; (ii) has satisfied the educational requirements for admission specified by this Rule; (iii) has passed the examination required by this Rule, or is eligible for admission without examination; (iv) has demonstrated such reputation and character as in the opinion of the Board indicates no reasonable basis for substantial doubts that the appllicant will adhere to the standards of conduct required of attorneys in this State; and (v) has evidenced a commitment to serve the administration of justice in this State."

The previous version of Rule 7 contained similar criteria, although they were stated in a different way and differed in certain details.

In order to meet the criterion of a commitment to serve the administration of justice in Tennessee, § 8.01 requires applicants to evidence that commitment by:

> "(a) A statement by the applicant before examination or before admission without examination that he or she intends to engage in the practice of law in Tennessee, and agrees to abide by the duties and standards imposed from time to time on attorneys in this State."

In each of the subject applications, the applicant is a person who is an employee or officer of a private corporation—a category now commonly referred to as "house counsel" or is an employee of a federal or state governmental agency; i.e., in both categories, what may be termed an "institutional lawyer."

Thus, a common issue in these matters is whether the employment of an applicant by a private corporation (not a professional corporation) or a governmental agency as an officer or employee thereof is so inconsistent with the statement of intent to engage in the practice of law in Tennessee as to preclude admission.

In addition, in each of these applications, admission is sought without examination on the basis of the experience of the applicant, pursuant to Article V of Rule 7. Article V empowers the Board to admit persons who have been admitted to practice law in other states upon demonstrating to the Board that the applicant possesses the knowledge, skills and abilities basic to competence in the profession. However, no person may be admitted without examination who has not actively engaged in the practice of law for at least five years. Section 5.02(a) then provides that "practice of law" for this purpose "includes being actively engaged as a full-time teacher of law in a law school approved by the American Bar Association, or may be construed in the Board's discretion as being actively engaged in other full-time employment requiring interpretation of law and application of legal knowledge (in which event the Board shall consider such evaluative criteria as time devoted to legal work, the nature of the work, whether legal training or a law license was a prerequisite of employment, and other similar matters)."

Section 5.03 states other factors for the Board's consideration in evaluating such applicants.

The experience of most of the applicants here has been gained in working as "house counsel" for private corporations or governmental agencies. Some of the applicants seek to use experience gained while working in Tennessee without being licensed as the basis of their demonstration of competence. Some have been in Tennessee for several years working as such house counsel or as a governmental employee.

Thus, the second general issue in these proceedings is whether working as house counsel or as a governmental employee in Tennessee should be considered as "practice of law" for the purpose of admission without examination and whether admission on that basis is limited to persons coming directly from other jurisdictions.

Lastly, if those applicants who have been working in Tennessee as house counsel or governmental employees were engaged in the practice of law or the law business without a license, then a question arises as to their fitness under Article VI of Rule 7.

Obviously, each of these issues turns on the concept of "practice of law."

THE CONCEPT OF "PRACTICE OF LAW"

Rule 7 does not contain a definition of "practice of law." As mentioned above, Article V does contain statements as to what the term "includes", and lists certain considerations for use in evaluating the experience of applicants, but those statements and considerations are expressly limited to the purposes of those sections.

Section 1.01 of Rule 7 provides,

> "License Required. No person shall engage in the 'practice of law' or the 'law business' in Tennessee, except pur-

suant to the authority of this Court, as evidenced by a license issued in accordance with this Rule, or in accordance with the provisions of this Rule governing special or limited practice."

As used there, the terms "practice of law" and "law business" in effect incorporate the definitions of those terms as set forth in § 23-3-101, Tenn. Code Ann.:

> "(a) The 'practice of law' is defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.
>
> (b) The 'law business' is defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation, as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights, or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

Section 23-3-103, Tenn. Code Ann., prohibits engaging in the "practice of law" or the "law business" without a license.

It appears obvious to the Board that in using the term "practice of law" in Articles V and VI of Rule 7, the Court intended to include both statutory concepts.

In Rule 8, the Code of Professional Responsiblity, Canon 3 states that "a lawyer should assist in preventing the unauthorized practice of law." Again, "practice of law" is not defined. Ethical Consideration 3-5 states,

"It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required."

In Rule 9, which sets up the disciplinary enforcement procedures for the bar, § 20.2 excepts therefrom:

"There shall be exempted from the application of this rule:

(a) Attorneys who are non-residents of the state and no longer practice therein.

(b) Retired attorneys.

(c) Attorneys on temporary duty with the armed forces.

(d) Faculty members of Tennessee law schools who do not practice.

(e) Attorneys not engaged in the practice of law. The term, 'the practice of law' shall be defined as any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy, in or out of court, rendered in respect to the rights, duties, regula-

> tions, liabilities or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document or law."

Rule 9, however, is a regulation of persons who have been admitted.

In analyzing the concept of "practice of law", reference should also be made to § 23-1-109, Tenn. Code Ann., which provides that "any person may conduct and manage his own case in any court of this state"; and of § 23-3-108, Tenn. Code Ann., which makes it a felony for "any person, either directly or indirectly, falsely to advertise himself as, or to hold himself out as, a lawyer." Under § 1-3-105(14), the general definition provision of the Code, "person" includes a corporation.

The courts have had occasion to construe and apply the definitions of "practice of law" and "law business", as set forth in § 23-3-101, Tenn. Code Ann., on several occasions in the context of determining whether some lay person was engaged in the unauthorized practice. The most significant case for the purposes of the issues here raised was *Haverty Furniture Co. v. Foust,* 174 Tenn. 203, 124 S.W.2d 694 (1939). In that case, a non-lawyer employee of the furniture company, a corporation, filled out the necessary forms for a writ of replevin and delivered it to a justice of the peace who issued the writ. The court held that the employee was not engaged in the law business because his acts were not done for a valuable consideration; and that he did not appear as an advocate and, thus, was not engaged in the practice of law. In the course of the opinion, the court said, at p. 210,

> "It may be remarked, in passing, that this limitation is consistent with what is, perhaps, the fundamental purpose underlying the enactment of the laws regulating admission to the bar and the practice of the profession, that purpose

> being to insure to the public the highest quality of service possible from those offering their services to the public for a consideration."

The court also emphasized, at pp. 212-213, that the employee was not acting as an independent representative of the corporation, stating at p. 214,

> "In other words, the phrase 'as an advocate in a representative capacity' implies a representation distinct from officer or other regular administrative corporate employee representation."

The court quoted from and relied upon *Sellent-Repent Corp. v. Queens Borough Gas & Elec. Co.*, 160 Misc. 920, 290 N.Y.S. (1936); but other New York cases hold to the contrary, and a 1939 New York statute provides that corporations must appear by licensed attorneys.

It should also be noted that the courts of other jurisdictions with virtual unanimity hold that a corporation cannot appear in court on its own behalf through an agent other than a licensed attorney, *see,* Ann., "Propriety and Effect of Corportions Appearance Pro Se, Through Agent Who Is Not Attorney", 19 A.L.R.3d 1073.

For example, 28 U.S.C. § 1654 provides that "parties" may conduct their own cases personally or by counsel, as the court by rule provides. The federal courts appear to have consistently held that corporations, under that statute, can only appear by attorneys-at-law. *See, e.g., Richdel, Inc. v. Sunspool Corp.*, 699 F.2d 1366 (Fed. Cir. 1983); *Southwest Express Co., Inc. v. ICC,* 670 F.2d 53 (5th Cir. 1982); *United States v. 9.19 Acres of Land, Etc.*, 416 F.2d 1244 (6th Cir. 1969).

Each of these definitions or statements with respect to the meaning of "practice of law" has been developed in an effort to deal with some particular issue. No one definition appears to this Board to provide a basis for the disposition of these issues by a process of simple application of the definition to the issues.

Accordingly, to determine the meaning of "practice of law" as used in Rule 7, it will be necessary to look to the specific context of the use of the term there.

THE CONCEPTS OF "ADMISSION" AND "LICENSE" AND THE TRADITIONAL IMAGE OF THE LAWYER

"Practice of law" is used in Rule 7 in the context of the purpose of that Rule—to provide for and govern the admission and licensing of attorneys-at-law.

As Rule 7 makes clear, an applicant seeks "admission to the bar of Tennessee." A license is granted by the court evidencing that admission, § 1.02. Section 1.03 sets forth the "criteria for admission." Thus, because he has been "admitted", the applicant is granted a "license" to practice law.

The concept of "admission" reflects the status of the lawyer in relation to the courts, often expressed in the phrase, an officer of the courts. That concept further implies the relation of the individual lawyer to the Bar, i.e., as a member of the Bar. The concept of "license" expresses the status of the lawyer in relation to the public, i.e., as an independent professional. The role and function, the rights and duties of lawyers follow from these two concepts. From these concepts, the traditional image of the lawyer is derived.

Thus, a license to practice law in Tennessee differs from other licenses issued pursuant to regulatory to tax legislation. That difference reflects the historic relationship between the bar and the courts. The attorney-at-law is an officer of the courts. Admission, licensing and disciplining of attorneys is a judicial function. *See, e.g., Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee,* 199 Tenn. 78, 282 S.W.2d 782 (1955); *In re Adoption of Rule of Court,* 479 S.W.2d 225 (Tenn. 1972); *Belmont v. Board of law Examiners,* 511 S.W.2d 461 (Tenn. 1974); *Petition of Tennessee Bar Association,* 539 S.W.2d 805 (Tenn. 1976); *State ex rel. Carden v. Fones,* 539 S.W.2d 810 (Tenn. 1976).

Admission As An Officer Of The Courts And As An Member Of The Bar.

The concept of "admission to the bar" includes the acceptance of the duties and obligations of the office or status of attorney. Article VIII of Rule 7 now makes specific that aspect of the concept of "admission" by requiring a commitment to serve the administration of justice in Tennessee. Section 8.01 states the applicable standard for that commitment,

> "The requisite commitment to serve the administration of justice in Tennessee subject to the duties and standards imposed on attorneys in this State shall be evidenced by:
>
> (a) A statement by the applicant before examination or before admission without examination that he or she intends to engage in the practice of law in Tennessee, and agrees to abide by the duties and standards imposed from time to time on attorneys in this State; and
>
> (b) Proof satisfactory to the Board that the applicant, before admission, has established his or her domicile in Tennessee."

Rule 8 now provides the general statement of the duties and standards applicable to those admitted to the bar of Tennessee. Rule 9 now provides the basic machinery for the enforcement of those duties and standards.

The distinctive nature of the concept of admission to the bar of Tennessee is rooted in the historic relation between lawyers and the courts, as derived from English law. As early as 14.02, admission to the office of attorney was defined, in 4 Henry IV, c 18,

> "For sundry Damages and Mischiefs that have ensured before this time to divers persons of the Realm by a great number of attornies, ignorant and not learned in the Law, as they were wont to be before this time; (2) it is ordained

> and stablished, that all attornies shall be examined by the Justices, and by their Discretions their Names put in the Roll and that they be good and vertuous, and of good Fame, shall be received and sworn well and truly to serve in their Offices, especially that they make no Suit in a foreign Country."

The earliest Tennessee statute governing "the admission and license of persons to practice as attornies in the several courts in this state", Chapter 2, Acts of 1798, set the basic nature of admission in Tennessee. Section 2 of that Act provided,

> "Be it enacted, That from and after the passing of this act, all persons who shall hereafter apply for admission to practice as an attorney at law, shall undergo an examination before two or more judges of the superior courts of law and equity for this state; and if such person so applying be found to possess a competent share of law knowledge, and be a person of upright character, such judges shall grant him a licence under their hands, to practice in any court in this state for which they may think him qualified."

Note that the basic pattern is essentially the same as that followed today: i.e., the application is for "admission"; the applicant is required to be examined; the basic criteria are "a competent share of law knowledge" and an "upright character"; and the judges grant a license.

In the Code of 1858, Part III, Title 4 is entitled "Of the Officers of Court." Chapter 1 covers judges and chancellors; Chapter 2, the Attorney General and reporter; Chapter 3, the District Attorney; and Chapter 4, "attorneys and counselors." The requirements for a license, the procedures for examination and licensing, the oath and striking from the rolls, are carried forward from the earlier statutes.

As a consequence of his status as an officer of the court, the lawyer's powers and duties differ from those of an ordinary

agent. *Robinson v. Air Draulics Co.*, 214 Tenn. 30, 39, 377 S.W.2d 908 (1964); *Ward v. Alsup*, 100 Tenn. 619, 739, 46 S.W. 573 (1898); *Hunt v. McLanahan*, 48 Tenn. 503, 509 (1870); *East Tennessee, Virginia and Georgia Railroad v. Williams*, 3 Shannon's Tenn. Cases 8, 10 (1878).

Those duties extend not only to the courts, but also to the Bar itself, i.e., to the legal profession. Thus, Canon 1 of Rule 8 provides that, "a lawyer should assist in maintaining the integrity and competence of the legal profession"; and Canon 2 provides that, "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

License As An Independent Professional.

While the concept of "admission" emphasizes the lawyer's status and duties as an officer of the courts, the concept of "license" emphasizes the lawyer's functions as a professional serving the public. Thus, the lawyer's duties are both to the courts and to the public and, more particularly, to his clients. These early statutes and the present rules carry forward the dual nature of the lawyer's duties.

Thus, the basis and nature of attorney-client relations is also rooted in history. *Scott's Revisals* of the Laws of Tennessee, including those of North Carolina in force in Tennessee from the year 1715 to the year 1820 inclusive, included § 5 of Chapter 4 of the Acts of 1743, which provided,

> "And be it further enacted by the authority aforesaid, That if any practising attorney in any court of record in this province, shall neglect to perform his duty in any action in which he shall be retained, or commit any fraudulent practice, such attorney shall be liable to an action on the case, at common law, in the general or county court of this province, to the party injured; and on the verdict passing against him, judgment shall be given by the said court, for the plaintiff, to recover double damages, with costs of suit."

Chapter 1 of the Acts of the Territorial Assembly of 1794, an Act to establish courts of law and regulate proceedings therein, provided for an oath for all attorneys,

> "4. . . .
>
> I, A. B. do swear, that I will truly and honestly demean myself in the practice of an attorney according to the best of my knowledge and ability.
>
> SO HELP ME GOD."

In these statutes, the general duties of attorneys are stated. From these general duties, the more detailed provisions of the present rules are derived.

Attorneys in this state, as in North Carolina, were compensated by their clients by the payment of fees. Those fees were the subject of regulation. For example, Chapter 14 of the Acts of 1786 provided in § 4 for a fixed schedule of fees "to be taken by attornies"; and in § 5 that for charging excess fees to a client, the attorney was guilty of "a misdemeanor in his office."

By statute, certain specified "fees" for attorneys were taxed as costs. In *Newnan v. Washington,* 8 Tenn. 78 (1827), the court held, however, that attorneys were not limited to such statutory fees, and could recover in *quantum meruit* for their professional services. In so holding, the court noted that neither North Carolina nor Tennessee had followed the early English view of the law as an honorary profession for the services of which no charges could be exacted.

The image of the lawyer in relation to his clients was summarized in *Planters Bank v. Hornberger,* 44 Tenn. 531 (1867), where the court said, at pp. 571-572,

> "An attorney is a man set apart by law, to expound, to all persons who seek him, the laws of the land, related to high interests of property, liberty and life. To this end, he is licensed and permitted to charge for his services."

Thus, while the lawyer was an officer of the courts and owed duties to the courts as such, he was, at the same time, independent. That independence was further reflected in the lawyer's relation to his clients. Thus, while the lawyer owes the client competence and zeal, "he is under no duty to do the client's bidding, *per se,* and should not pander to his wishes." GIBSON'S SUITS IN CHANCERY (6th Ed.), § 649, p. 691.

In the traditional terminology of the law, the lawyer was an agent of the client and an independent contractor, not a servant.

The Traditional Image Of The Lawyer.

From this background, the traditional image of the lawyer developed, i.e., he was an officer of the court, admitted by the courts and subject to the courts' discipline, and, at the same time, an independent professional serving the public generally, particularly his clients, and compensated by fees paid by those clients.

The court's analysis in *Haverty Furniture* is based upon that traditional image of the role and function of the lawyer.

In *Haverty Furniture,* the court remarked "in passing", at p. 210, as to the fundamental purpose of the regulation of lawyers, "to insure to the public the highest quality of service possible from those offering their services to the public for a consideration." As the court makes clear, payment of a salary to a non-lawyer was not such a consideration. From this language, from the court's decision, and from numerous other sources, the traditional image of the lawyer is confirmed, characterized by an emphasis on independence in judgment and service to the public, made possible and supported economically by fees from clients.

The Code of Professional Responsibility, Rule 8 of the Rules of the Tennessee Supreme Court, continues to emphasize the independent professional judgment of the lawyer. Thus, Ethical Consideration 1-1 provides,

> "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. . . ."

Canon 5 provides, "a lawyer should exercise independent professional judgment on behalf of a client." The Ethical Considerations and Disciplinary Rules which follow that Canon consist of detailed elaborations and applications of that general concept, which are succinctly summarized in the last sentence of Ethical Consideration 5-24,

> "Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer."

Service to the public continues to be emphasized. Ethical Consideration 1-1 speaks of ready access to independent professional services to all. Canon 2 is concerned with meeting the needs of the public for legal servcies. Ethical Consideration 2-26 deals with the acceptance by the lawyer of "his share of tendered employment which may be unattractive both to him and the bar generally." Ethical Consideration 7-1 provides, "the professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits."

The economic basis of a lawyer's independence in a system of compensation based on fees paid by clients continues to be assumed and regulated. *See, e.g.,* Ethical Considerations 2-17 through 2-23.

For many years, such was the well nigh universal reality of the nature of the lawyer's role and function. Attorneys General and District Attorneys were the sole state-paid lawyers, and they

were public officers, not employees. Even the lawyers who worked for other lawyers were "associates" and not salaried employees. Few lawyers worked, as such, as employees of corporations.

THE INCREASING SIGNIFICANCE OF INSTITUTIONAL LAWYERS

New, and sometimes innovative, means of providing legal services have been developed, and continue to be developing—ranging from various legal aid organizations, to various forms of insurance, to the legal departments of governmental and corporate entities.

Indeed, one of the more striking changes in the provision of legal services has been the marked growth in the organization and expansion of law departments, both in private corporations and in governmental agencies. A substantial number of lawyers now work in such law departments on a full-time basis as salaried employees or corporate officers. In common law terms, they are not independent contractors, but, rather, are servants; or, in more modern terminology, employees.

For that matter, the responsibilities, functions and compensation of the young lawyer starting to work in a corporation or governmental agency law department differ, if at all, only in degree and amount from those of his peers working for a large law firm.

In part, these trends are but further evidence of the increased commercialization of the profession noted in *Haverty Furniture*. More significantly, they evidence the growing institutionalization of the profession. Lawyers, even "partners" in law firms, with greater frequency tend to think of themselves, and are seen by others, as working for a commercial or business institution. Indeed, the emphasis of a large part of the literature on managing the law firm or managing the law department is on the techniques of the business institution.

Moreover, the institutional lawyer tends to be a specialist, and frequently such specialization has little relation to Tennessee law or to the public or courts of Tennessee.

Institutionalization and specialization tend to diminish the significance, if not the relevance, of state regulation and to foster the nationalization of the profession—a tendency which has been furthered by the decisions of the federal courts striking down the exercise of traditional state powers over the profession. Policies favoring community identification and community service are under attack.

Under such circumstances, the lawyer is likely to be, and to be considered as, simply another technical expert, rather than as an independent professional serving both as an officer of the courts of a state and as an advocate and counselor for his clients.

To some extent, issues pertaining to institutional lawyers are recognized in the provisions of Rule 8.

Thus, in discussing the role of the lawyer working for a legal assistance organization, Ethical Consideration 2-33 states,

> ". . . An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence."

In discussing the role of the lawyer employed by an organization, Ethical Consideration 5-24 states,

> ". . . Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that chang-

ing circumstances do not result in loss of the professional independence of the lawyer."

These admonitions, however, do not provide an answer to the issue as to the point, if any, where the institutional lawyer should be considered as having so far departed from the traditional image of the lawyer, as expressed in the rules, statutes and judicial decisions of Tennessee, as neither to be entitled to admission, nor to be required to be licensed.

SHOULD THE EMPLOYMENT OF AN APPLICANT BY A CORPORTION OR A GOVERNMENTAL AGENCY, AS A CORPORATE OFFICER OR EMPLOYEE, BE CONSIDERED AS A DECISIVE CRITERION IN DETERMINING WHETHER THAT APPLICANT HAS BEEN, OR INTENDS TO BE, ENGAGED IN THE PRACTICE OF LAW?

Obviously, all legally trained persons of good moral character who work as employees of governmental agencies or corporations are not engaged in the practive of law. The Board is aware of no rule of law or policy which requires or entitles all such persons to be licensed.

Admission to the Bar of Tennessee is predicated on a commitment to serve the administration of justice in Tennessee. A license to practice law is predicated on the exercise of independent professional judgment. Indeed, such independence may be considered as an essential aspect of professional competence.

Under a strict construction of the applicable provisions of Rule 7, in the light of the authorities here discussed, denial of admission to all applicants who intend to work as employees of governmental agencies or corporations could be justified on the ground that such persons do not intend to engage in the practice of law.

The adoption of such a policy, however, would obviously have serious implications for the future of the profession. An analysis of the consequences of that course is necessary.

The consistent rejection of the institutional lawyer for admission would, first, mean that those law school graduates who go to work for institutions as employees would not be eligible for admission, and, thus, whould likely never be admitted.

The profession would rapidly become divided into the regulated and the unregulated, giving rise to disputes which might better be avoided. For example, issues as to whether the lawyer-employee of law firms should be admitted would likely arise, along with issues as to invidious discrimination between the regulated and the unregulated.

From the testimony and briefs in the record in these proceedings, it further appears that institutional lawyers would consider such a rejection to be not only demeaning, but also a violation of their professional expectations, if not rights.

It is not clear where the interests of the institutional employer lie in this regard. Micus briefs were filed on behalf of several corporations and the Tennessee Valley Authority. All favored admission and, thus, regulation of at least those institutional lawyers who sought admission in these proceedings, although on different grounds. These arguments may not, however, be fully representative. Clearly, it may be in the interests of the institution to be able to transfer lawyers from state to state without concern for admission in a particular state. There are risks to the institutional employer that the attorney-client privilege, and similar evidentiary privileges, might not be applicable to such lawyers.

The institutional lawyer, moreover, is not likely to be isolated from the public. He or she, whether admitted or not, is likely to be regarded by the lay public as a lawyer. Moreover, many of these applicants expressed a desire to do *pro bono* work, and to be involved in bar association and other professional activities.

Certainly, their activities as institutional lawyers, while directly related to their employers, may and likely would affect others.

In addition, denying such lawyers admission would raise numerous issues as to the permissible scope of their activities, such as, e.g., whether they could work for affiliated corporations, whether their work required the supervision of a licensed attorney, etc. No doubt there would be other difficulties in administering such a system.

On balance, the Board concludes that it is not in the best interest of the institutional lawyers, of the profession generally, or of the public, to deny admission to institutional lawyers solely on the basis that they do not conform to the traditional image of the lawyer. Institutional employment is not necessarily inconsistent with the exercise of independent professional judgment or with a commitment to serve the administration of justice in Tennessee.

The task of the Board, thus, becomes one of accommodating the traditional standards of admission to the institutional lawyer and vice versa.

WHAT CRITERIA SHOULD BE CONSIDERED IN DETERMINING WHETHER AN APPLICANT WHO INTENDS TO WORK AS AN EMPLOYEE OF A CORPORATION OR GOVERNMENTAL AGENCY MEETS THE REQUISITE COMMITMENT TO SERVE THE ADMINISTRATION OF JUSTICE IN TENNESSEE?

Under § 8.01(a), the requisite commitment to serve the administration of justice in Tennessee is to be evidenced by a statement that the applicant intends to engage in the practice of law in Tennessee and agrees to abide by the duties and standards imposed from time to time on attorneys in this state. No distinction is made between lawyers in the traditional role of independent professional and those working as employees of institutions. Obviously, however, there are differences in the activities of the two categories.

It is important for the profession generally, as well as for applicants for admisison, and institutional employers, to understand how the concept of practice of law and the duties and standards of Rules 8 and 9 relate to the institutional lawyer. In view of the complex and varying nature of the functions of institutional lawyers and of the necessarily open-ended concept of "practice of law", the Board cannot lay down either some clear, bright line, or some comprehensive definitive statement. Certain criteria, however, can and should be stated.

First, the primary criterion is the applicant's commitment to serve the administration of justice in Tennessee. That commitment necessarily implies a relation to the courts of Tennessee, as an officer thereof; to the Bar of Tennessee, as a member thereof; and to the public in Tennessee, as a source of competent independent professional judgment.

Commitment is necessarily largely a subjective concept. Thus, each applicant has a duty to become familiar with the duties and standards imposed on lawyers in Tennessee as expressed in Rules 8 and 9 of the Rules of the Tennessee Supreme Court; and to evaluate his or her good faith in making that commitment in the light thereof.

Second, whether an applicant intends to engage in the practic eof law should be evaluated on the basis of whether that applicant intends to function as a lawyer. As Ethical Consideration 3-5 of Rule 8 points out, in the context of a discussion of unauthorized practice, a single, specific definition of what constitutes the practice of law is neither necessary nor desirable. Functionally, however, the key factor is the rendition of services that call for the professional judgment of a lawyer. The definitions expressed in § 23-3-101(a) and (b), Tenn. Code Ann., and in § 20.2(e) of Rule 9, furnish further guidelines for such a functional test.

In addition, the Board will consider such other criteria as: whether the applicant is required by his or her employer to be

licensed; whether and to what extent denying a license would be prejudicial to the interests of the applicant and his or her employer; whether the work of the applicant would be such as to make it appropriate to impose the duties and standards of Rule 8 and the disciplinary procedures of Rule 9 on teh applicant; and any other factors which may appear to the Board to be relevant to the basic inquiry in the context of the particular application.

For the purpose of evaluating the statement of intent to practice law, a broad concept of the lawyer's function should be used. It should be recognized, however, that many of the specific tasks performed by lawyers may be, and often are, performed by non-lawyers. Accordingly, "practice of law" for purposes of admission is necessarily broader than "practice of law" for purposes of unauthorized practice. Nevertheless, where the primary function of an applicant will be in some capacity not requiring professional legal education or judgment, the required statement of intent cannot be given.

Third, in order to engage in the practice of law, a person must exercise and preserve his professional independence. Judgment is not truly professional unless it is independent. Whatever the nature of his relation to his client, the lawyer's professional judgment must be his own. As Ethical Consideration 5-24 of Rule 8 provides,

> ". . . Although other innovations in the means of supplying legal counsel may devellp, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer."

The initial and primary responsibility for evaluating an applicant's intent rests with the applicant himself. Admission is always instituted by an application, by the conscious decision of the applicant to seek admission.

Thus, issues for the Board in this regard will always arise in terms of whether a particular applicant should be denied admission on the ground that he or she does not actually intend to engage in the practice of law so as to satisfy the requisite commitment to serve the administration of justice in Tennessee.

The applicable criteria are not wholly subjective. Where the applicant is working for a corporate or governmental institution and intends to continue doing so, or indicates an intention to accept such employment, issues as to the accuracy of the applicant's statement of intent may arise.

In this connection, it is well to put this requirement in context. Admission is not granted simply to satisfy the desires of an applicant, or even to enable an applicant to follow a more profitable career. Admission is granted in order that the applicant may serve the administration of justice in Tennessee. Such service requires that the applicant intend to engage in the practice of law in Tennessee.

Competence and character should be tested as close to the actual beginning of practice as practicable. Therefore, the intention to practice must be a present intention.

Lastly, it should be observed that the criteria here discussed are applicable to all applicants. By here emphasizing their application to institutional lawyers, the Board should not be understood as applying some different criteria to such lawyers. The same general criteria are applicable to all.

MAY WORKING AS AN INSTITUTIONAL LAWYER CONSTITUTE THE "PRACTICE OF LAW" FOR THE PURPOSE OF ADMISSION WITHOUT EXAMINATION, AND SHOULD ADMISSION ON THAT BASIS BE LIMITED TO PERSONS COMING DIRECTLY FROM OTHER JURISDICTIONS?

The basis for waiving the requirement of an examination is a determination of the knowledge, skills and abilities basic to competence in the profession. § 5.01, Rule 7.

There is nothing in either Article V of Rule 7, or in the nature of institutional practice as such, which would preclude working as an institutional lawyer, in and of itself, from serving as the basis for admission without examination. Certainly, institutional lawyers may, and often do, perform essentially the same functions and gain essentially the same experience as lawyers working in more traditional roles.

However, working as a mere legal technician, working in a capacity not requiring legal training or skill, or working in any way not requiring the exercise of independent professional judgment, will not be sufficient.

Moreover, since the basis of this criterion is the nature of the experience of the applicant and not the location where he or she obtained it, waiver should not be limited to persons coming directly from other jurisdictions. In addition, with the adoption of the policies here enunciated, this issue should not arise in the future, except in highly unusual circumstances.

SHOULD APPLICANTS WHO HAVE BEEN WORKING IN TENNESSEE AS INSTITUTIONAL LAWYERS BE DENIED ADMISSION ON THE GROUND THAT THEY HAVE BEEN PRACTICING LAW IN TENNESSEE WITHOUT A LICENSE AND ARE, THUS, UNFIT UNDER ARTICLE VI OF RULE 7?

The Board can and will take official notice of the fact that an indeterminable number of persons have been working in Tennessee as institutional lawyers without being licensed in Tennessee. The Board can and will further take official notice of the fact that there has been no consistent policy of enforcing the requirement of admission for institutional lawyers.

Indeed, the decision of the court in *Haverty Furniture* could be asserted as a good faith defense to any charge of unauthorized practice on the part of such institutional lawyers.

The applicable standard for evaluating the character of applicants is stated in § 6.01 of Rule 7,

> "Applicable Standard. An applicant shall not be admitted if in the judgment of the Board a reasonable person could fairly find that there is such substantial doubt as to that applicant's honesty, respect for the rights of others, and adherence to and obedience to the Constitution and laws of the State and nation as to justify the conclusion that such applicant is not likely to adhere to the duties and standards of conduct imposed on attorneys in this State. Any conduct which would constitute grounds for discipline if engaged in by an attorney in this State, shall be considered by the Board in making its evaluation of the character of an applicant."

On the basis of the facts before it, the Board found no reasonable basis for a judgment that there was substantial doubt as to the character of the applicants whose applications prompted these proceedings.

However, the Board is concerned about the effect of this statement of policy on such other persons who may be working as institutional lawyers in this state without being licensed.

The Board does not conceive that its statements of policy have any binding effect without the express sanction of the Tennessee Supreme Court. The Board recognizes that the Tennessee Supreme Court, and not this Board, determines policies with respect to admission. In order that doubt as to the future applicability of the admission policies under Rule 7 may be resolved, the Board urges the Court to enter a formal order approving the statement of policy adopted by the Board, in such form as the Court may consider appropriate, and to publish that order in the official opinions of the Court.

FURTHER CONSIDERATIONS

The result of the adoption of the statement of policy here enunciated would be that lawyers working as such in an institutional seting, whether as employees of a private corporation or a state governmental agency, would generally and ordinarily not only be entitled to be licensed, but would also be required to be licensed. Under the circumstances, the Court may wish to consider giving the adoption of such a policy prospective effect, including the provision of a stated grace period during which applications could be filed without prejudice.

Since this policy is based upon a construction of the existing rules, no changes in the rules of the Court are necessary in order to give it effect. The Court may, however, wish to re-examine the rules with these issues in mind.

The adoption of such a policy will not mean that all legally trained persons working for corporations or governmental agencies will be required to be licensed in Tennessee. Decisions as to whether a person is engaged in the unauthorized practice will still have to be made on a case-by-case basis in the particular context in which the issue may arise.

As heretofore indicated, other constructions of the rules are possible and have some support in reason and authority. The two most likely alternatives are: (i) no person is entitled or required to be admitted and licensed unless he or she holds himself or hereself out to the public generally as a lawyer, and unless that person's professional independence is evidenced by the fact that he or she is paid for his or her services by clients on a fee basis, as distinguished from a salary; and (ii) a person who works strictly as a salaried employee for a corporation or governmental agency is not engaged in the practice of law, even though performing functions requiring legal training and the exercise of legal judgment in the context of issues of unauthorized practice, but is engaged in the practice of law in the context of the required statement of intent to engage in the practice of law.

The deficiencies of the former approach have already been discussed.

The deficiencies of the latter require no extended discussion. Under such a construction, institutional lawyers would not be required to be licensed, but could become licensed at their own election as they might choose. Such a construction would create a favored class. If licensing is to be optional, the privilege of choosing should be given to all performing essentially the same functions. The concept of practice of law should not be construed in such an inconsistent fashion.

Indeed, if a division of the profession is to be adopted, it might be advisable to consider issuing two types of licenses: (i) an advocate's license to practice law as defined in § 23-3-101(a); and (ii) a counselor's license to engage in the law business as defined in § 23-3-101(b). A person could hold either or both types. Different ethical standards could be adopted for each. Different requirements for admission could be established. Many of the issues raised here could well be handled more effectively under such a system. It might well be more in keeping with the realities of contemporary trends of commercialization, institutionalization and specialization.

Some states have adopted specific rules pertaining to house counsel. For example, Oklahoma grants a "special temporary permit to practice law in Oklahoma, without examination, so long as such person remains in the employ of, and devotes his full time to the business of, and receives compensation for legal services from no other source than, his said employer"; and Idaho issues a "house counsel certificate" under similar circumstances.

Tennessee Valley Authority, in its supplemental memorandum, suggested the adoption of a new § 10.05 to Rule 7, acknowledging the status of TVA attorneys as federal government attorneys not subject to Tennessee's licensing requirements. In that connection, TVA referred to rules adopted in Mississippi and Nevada dealing with lawyers employed by the federal government. TVA also suggested changes in § 5.02, expressly recognizing work for TVA.

The advisability of the adoption of such rules was not before the Board, however, and no position is taken in that regard in this Opinion.

CONCLUSION

On the basis of the foregoing opinion, the Board has adopted the Statement of Policy which appears as an appendix to this Opinion.

The Board's Statement of Policy, this Opinion and the entire record in these proceedings will be submitted to the Tennessee Supreme Court for its consideration. Any person desiring to submit further material to the Court should contact the Clerk with respect thereto.

This 25th day of September, 1984.

Val Sanford, President

Wheeler A. Rosenbalm,
Vice President

Charles W. Burson,
Secretary-Treasurer

ATTEST:

/s/ Katherine Darden
Katherine Darden, Administrator

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

In Re Board Of Law Examiners

ORDER

(Filed Dec. 19, 1984)

On September 26, 1984 there was filed in this Court a statement of policy concerning the practice of law filed by the Tennessee Board of Law Examiners, together with an opinion dated September 25, 1984, in which the Board stated its rationale for the adoption of that policy.

The policy sets out criteria and standards by which the Board will determine whether or not an individual is engaged in the practice of law for purposes of licensure and admission to the Bar.

Prior to the filing of its opinion and Statement of Policy, the Board had extensive hearings during August 1984 on the subject and received applications from a number of individuals for licenses to practice law without examination. During October 1984 the Board issued orders certifying seven persons as being qualified for admission without examination, and during November 1984 it issued orders certifying five other persons as being so qualified.

The Board has requested this Court to consider its actions with respect to all of the foregoing, and the Court has done so. After consideration of the foregoing Opinion of the Board and its accompanying Statement of Policy, and of the individual orders issued by the Board during October and November 1984, the Court is of the opinion that the actions of the Board should be and the same hereby are in all respects approved, ratified and confirmed, and it is accordingly so ordered.

ENTER this 19th day of December, 1984.

/s/ Robert E. Cooper,
Chief Justice

/s/ William H. D. Fones, Justice

/s/ Ray L. Brock, Justice

/s/ William J. Harbison, Justice

/s/ Frank F. Drowota III, Justice

Office of CLERK OF THE SUPREME COURT

For the Middle Division of The State of Tennessee

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, prefect, and complete copy of the ORDER *of said Court, pronounced at its December term, 1984, in case of* IN RE: BOARD OF LAW EXAMINERS *as appears of record now on file in my office.*

In testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 19th *day of* December, 1984.

/s/ Ramsey Leathers, *Clerk*

/s/ *By* Anita Pace, *Deputy Clerk*

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Order Amending Supreme Court Rules And Adopting Rules
Governing Appearance Of Out-Of-State Counsel
Pro Hac Vice

I.

It is ORDERED that the last sentence in Supreme Court Rule 6, which reads as follows, be and it is hereby stricken:

> "Citizens of this and other states who do not intend to practice their profession regualrly in the courts of this State will not be admitted; provided, nonresident attorneys desiring to argue a case in which they have been employed, will, by comity, be allowed to do so, when presented by a member of the bar of this Court."

II.

It is ORDERED that Supreme Court Rule 7, paragraph 10.01 be and it is hereby stricken in its entirety.

III.

It is ORDERED that the following rule be, and it is hereby promulgated as Supreme Court Rule 19, effective from and after the date of this Order.

> RULE 19 — APPEARANCE IN THE TRIAL AND APPELLATE COURTS OF TENNESSEE OF OUT-OF-STATE COUNSEL *PRO HAC VICE*
>
> A lawyer residing outside of the State of Tennessee who is licensed, in good standing and admitted to practice before the court of last resort in the state of his residence, will be permitted to appear *pro hac vice,* file pleadings,

briefs, and fully participate in the trial and appellate courts of Tennessee subject to compliance with the following conditions:

(1) A foreign lawyer shall file an affidavit with the clerk of the court in which he or she desires to appear not later than the first occasion on which the foreign lawyer files any pleading, etc., or appears personally, which affidavit shall contain the following information.

(a) The full name, residence address, office address and style of the case in which affiant desires to appear.

(b) A statement that affiant is currently licensed, in good standing, admitted to practice before the court of last resort of the state of his or her residence and that no disciplinary action or investigation of his or her conduct is pending.

(c) A statement that affiant agrees to subject himself or herself to the jurisdiction of the courts of Tennessee in any manner arising out of his or her conduct in such proceedings and agrees to be bound by the Code of Professional Responsibility applicable to Tennessee lawyers and the interpretation thereof by Tennessee courts.

(2) No foreign lawyer may appear *pro hac vice* in any court of this State unless he or she has first associated a lawyer who is licensed, in good standing, resides and maintains a law office in the State of Tennessee. The Tennessee lawyer and the lawyer appearing *pro hac vice,* shall sign all pleadings, motions, briefs, etc., and the Tennessee lawyer shall personally appear for all court proceedings, unless excused by the court in which the case is pending.

(3) If the state in which the foreign lawyer resides imposes more restrictive conditions for appearance *pro hac vice* than hereinabove provided, such foreign lawyer must also comply fully with all of the conditions that the state of

his or her residence imposed upon Tennessee lawyers before he or she will be allowed to appear in the courts of this State.

Enter this the 1st day of October, 1984.

/s/ R. E. Cooper
Chief Justice

/s/ Wm. H. D. Fones
Justice

/s/ Ray L. Brock
Justice

/s/ William J. Harbison
Justice

/s/ Frank F. Drowota III
Justice